Supreme Court, U.S.
FILED

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No. 94-

IN THE

Supreme Court of the United States

October Term, 1994

THOMAS TRUPIANO,

Petitioner,

v.

CAPTAIN GUS & BROTHERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

55pp

QUESTION PRESENTED

1. Whether the Appeals Court was in error by failing to apply the proper standards of law, as propounded by the U.S. Supreme Court, in affirming the District Court's decision to deny plaintiff's recovery of punitive damages for defendant's failure to pay maintenance and cure.

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STATEMENT OF GROUNDS

This case was originally brought before the United States District Court for the District of Massachusetts. That Court rightly had jurisdiction as admiralty falls under the original juris-diction of the District Court pursuant to 28 U.S.C. 1333(1). (Appendix, p.38)

On April 14, 1994, the United States District Court decided for the plaintiff on the issue of maintenance and cure and for the defendant on the issue of punitive damages for failure to pay maintenance and cure. (Appendix, p.6) That decision was later affirmed by the United States Court of Appeals for the First Circuit on December 15, 1994. (Appendix, p.2 et seq.)

The Court of Appeals, in reviewing the decision below, conflicted with other decisions in the First Circuit, decisions in other Circuits, and even Supreme Court decisions.

Therefore, jurisdiction is conferred upon the United States Supreme Court pursuant to Sup. Ct. R. 10 (.1)(a) & (c).

STATEMENT OF THE CASE

Proceedings Below

This is an action to recover punitive damages for the defendant's failure to pay maintenance and cure to the plaintiff who was injured on September 1, 1987, while working as a seaman on board the F/V CAPTAIN GUS. The case was brought in the United States District Court, as admiralty is under the original jurisdiction of the District Court pursuant to 28 U.S.C. 1333 (1). (Appendix, p.38) Suit was commenced on March 24, 1989, claiming that the defendant was liable for maintenance and cure to the plaintiff. The plaintiff also sought punitive damages and attorney's fees for the defendant's bad faith in its refusal to pay maintenance and cure. At the conclusion of the trial, which lasted from January 25 - 29, 1993, the jury returned a verdict for the plaintiff on the issues of Count I (under the Jones Act) and Count II (under the General Maritime Law regarding the unseaworthiness of the defendant's vessel). However, the issues of maintenance and cure and punitive damages were referred to the trial judge United States Magistrate Judge Robert B. Collings. Magistrate Collings found for the plaintiff on maintenance and cure and for the

defendant on the issue of punitive damages and attorney's fees. Judgment was entered on April 14, 1994 from which the plaintiff appealed. (Appendix, p.36) Judgment was affirmed by the United States Court of Appeals for the First Circuit on December 15, 1994. (Appendix, p.1)

STATEMENT OF FACTS

On September 1, 1987, the Plaintiff, Thomas Trupiano, was a seaman and a crewmember aboard the F/V CAPTAIN GUS, owned and operated by the Defendant, Captain Gus & Brothers, Inc. On the above date, the Plaintiff, Thomas Trupiano, slipped and fell on hydraulic fluid injuring his back.

On February 3, 1988, the Plaintiff formally presented a claim for maintenance and cure. Thereafter, the Plaintiff through his attorney, has made repeated demand for payment of maintenance and cure and has continually provided documentary evidence in the form of medical records and bills indicating that the Plaintiff was undergoing medical treatment and had not reached an end medical result.

On or about March 24, 1989, the Plaintiff filed a complaint and jury trial demand. A Count for maintenance

and cure was included in the standard three court seaman's complaint.

As a response to the Plaintiff's amended complaint and jury trial demand, the Defendant on or about September 24, 1990 denied any and all allegations that "As a result of his injuries, the Plaintiff incurred expenses for his maintenance and cure and will continue to do so all to his damage as will be shown at trial." In addition to a judgment in the sum of thirty thousand ($30,000.00) dollars together with costs and interest, the Plaintiff demanded an award for punitive damages and attorney's fees for the Defendant's willful and persistent failure to make prompt payment of maintenance and cure during the period of the Plaintiff's disability.

On September 25, 1990, pursuant to agreements with the Defendant's attorney, the Plaintiff's attorney reviewed his file to determine the period of time Mr. Trupiano was entitled to receive maintenance and cure. Prior to the above date, a letter was sent to Mr. F. Louis Fitzpatrick of Chadwick Services, Ltd., the defendant's agent, detailing Mr. Trupiano's entitlement of maintenance benefits. Further correspondence with Mr. Thomas Frost of St. Paul Fire and Marine Insurance Co. showed that during a

telephone conversation, it was agreed that maintenance would be paid upon receipt of information concerning the statement of Charles Reed, the captain of the vessel at the time of the Plaintiff's injuries. The information requested was forwarded to the Defendant.

On October 18, 1988 and on February 26, 1992 the Plaintiff was examined and evaluated by Gordon F. Lupien, M.D., an orthopedic physician hired by the Defendant. On both occasions, Dr. Lupien failed to diagnose the Plaintiff's injuries. Dr. Lupien totally disregarded any and all objective findings from the diagnostic tests (CT scan and MRI) he had at his disposal which showed a herniated disc. Without performing any objective tests, Dr. Lupien concluded from a single physical examination that "Mr. Trupiano's examination revealed no objective evidence of any physical impairment or loss of physical function." Specifically, "there was no indication of a nerve root compression, intervertebral disc protrusion, or any other potentially incapacitating structural lesion of the musculoskeletal system," and that Mr. Trupiano was not injured "as a consequence of any incident which may have occurred during 1987."

On December 6, 1991 the Defendant was notified that the Plaintiff, Thomas Trupiano. necessitated surgery to correct his back injury. It was requested that the Defendant assume responsibility for the payment of the bills pursuant to its maintenance and cure obligation. A response was received on January 28, 1992 wherein "the insurer" declined to assume any responsibility for medical bills. The letter seemed to suggest that the ruling on a pending Motion for Physical Exam (which was subsequently allowed) would affect the insurer's decision to pay for Mr. Trupiano's medical care. On March 12, 1992 the Defendant, through St. Paul, opined that no surgery was necessary or warranted to Mr. Trupiano.

In subsequent communications via telephone and correspondence, the Defendant persistently and adamantly refused to satisfy its obligations as to maintenance and cure.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO IMPOSE PUNITIVE DAMAGES AGAINST THE DEFENDANT FOR ITS REFUSAL TO PAY MAINTENANCE AND CURE.

In the landmark case of Vaughan v. Atkinson, 369 U.S. 527 (1962), The United Supreme Court ordered an award of punitive damages to an injured seaman where the shipowner's refusal to provide maintenance and cure was found to have been callous, willful, and recalcitrant.

The First Circuit Court of Appeals is bound to apply this standard. Although the Court purports to have applied this standard, it appears it was applied inadequately. The plaintiff presented overwhelming medical and factual evidence to the Defendant. This evidence clearly proved that the Plaintiff had been injured in the service of his vessel.

However, it seems that this evidence was ignored not only by the defendant, but by the District Court and Court of Appeals as well. Furthermore, the standard of

"callous, willful, and recalcitrant" propounded by the Supreme Court was ignored as well. The above standard is not foreign to the First Circuit. In Robinson v. Pochahontas, Inc., 477 F.2d 1048 (1st Cir. 1973), the Court quoted Justice Stewart's separate opinion in Vaughan; the Court propounded the following standard:

> [I]f the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages. McCormick, Damages, Sec. 79. While the amount so awarded would be in the discretion of the fact finder and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made. Robinson v. Pochahontas, Inc., 477 F.2d 1048 (1 Cir. 1973).

The United States Court of Appeals for the Fifth Circuit in three separate cases, citing both Vaughan and Robinson, sanctioned an award of punitive damages and a separate award of attorney's fees if the shipowner is proven to have been callous, arbitrary, or capricious in failing to pay

maintenance and cure. In Holmes v. J. Ray McDermott & Company, Inc., 734 F.2d. 1110 (1984), the plaintiff had been paid maintenance and cure for a period of time during which he had been examined by four doctors to whom defendant had referred him. None of the doctors had found objective evidence of a back injury. The defendant terminated the plaintiff's maintenance and cure based on the physician's findings.

Two days later, the plaintiff saw a physician of his choice, who hospitalized him a month and performed a lumbar laminectomy. The defendant refused to reinstate maintenance benefits and pay the plaintiff's medical bills, despite receipt of medical reports from the physician and the hospital.

The Holmes Court held that the defendant was arbitrary and capricious in failing to reinstate maintenance and cure after it had learned of the diagnosis of plaintiff's injury by the fifth physician and the subsequent surgery. Apparently the Court was impressed with the defendant's failure to accept the plaintiff's claim after he had seen his physician and notified the defendant of his diagnosis and treatment.

The Holmes Court rejected the defendant's contention that it refused to reinstate benefits because the plaintiff's physician never had his diagnosis confirmed by any of the four doctors who had examined the plaintiff previously. In fact, the Court said that this excuse, combined with defendant's failure to verify plaintiff's claim for reinstatement, "Provided an ample basis for a finding of arbitrary and willful conduct." Holmes, Id.; see also Harper v. Zapata Offshore Company, 741 F.2d 87 (5th Cir. 1984) and Tullos v. Resource Drilling, 750 F.2d 380 (5th Cir. 1985). It is clear that the Fifth Circuit closely follows Vaughan; the First Circuit should be held to the same standard.

The present case is very similar to Holmes. However, where the plaintiff in Holmes had only his one doctor to rebut the defendant's four, Mr. Trupiano has four to rebut the defendant's one. Clearly, that makes Mr. Trupiano a better plaintiff than Mr. Holmes and punitive damages should have been awarded.

Clearly, the Court of Appeals' decision below goes against the logic of the Supreme Court, Robinson, and the Fifth Circuit.

The decision of the United States Court of Appeals refers to the fact that the District Court's decision was reviewed under the clearly erroneous standard of Fed. R. Civ. P. 52(a). The Court opines, "we cannot say that the District Court clearly erred in finding that defendant's failure to make timely payments of maintenance and cure, though eventually adjudged to be without adequate basis, did not justify the imposition of punitive damages and/or attorney's fees."

The Court further explains its rationale with, "After all, when there are two plausible sets of inferences that can be drawn from the facts, the trier's choice between them cannot be clearly erroneous." However, the Court's reasoning flies in the face of the maintenance and cure standard propounded by the Supreme Court in Warren v. Untied States, 340 U.S. 523 (1951). The court held that when there are ambiguities or doubts, they are resolved in favor of the seaman. Therefore, in light of Warren, there were not two "plausible sets of inferences" as the Court of Appeals states. The only inference that could have been drawn was that the defendant acted in bad faith in refusing to pay maintenance and cure. Any other inference was "clearly erroneous."

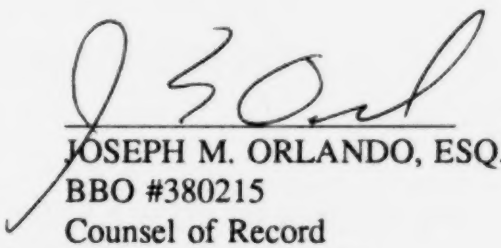
Furthermore, the Warren court opined that, "In maritime law it has long been held that while fault of the seaman will forfeit the right to maintenance and cure, it must be some positively vicious conduct - such as gross negligence or willful disobedience of orders." Id. at 528.

Certainly, the plaintiff did not engage in any "positively vicious conduct" which would preclude his recovering maintenance and cure. Furthermore, whether the defendant doubted his injury is inconsequential as the standard clearly states that when there is doubt, maintenance and cure is still paid. Therefore, it logically follows that the defendant exercised willful, callous and recalcitrant conduct in refusing to pay maintenance and cure. It also follows, in light of the standards, that the District Court's decision was indeed clearly erroneous. Therefore, the defendant should be compelled to pay punitive damages.

CONCLUSION

Both the District Court and the Court of Appeals failed to apply the appropriate standards as propounded by decisions of First and Fifth Circuits and the United States Supreme Court. Therefore, the plaintiff's Petition for a Writ of Certiorari should be granted, pursuant to Sup. Ct. R. 10(.1)(a) & (c).

Plaintiff/Petitioner,
Thomas Trupiano,
By His Attorneys,



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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1690

THOMAS TRUPIANO,
Plaintiff, Appellant,

v.

ENZA ROSA, CORPORATION,
Defendant, Appellee,

CAPT. GUS & BROTHERS, INC.,
Defendant, Appellee,

JUDGMENT

Entered: December 15, 1994

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and it was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: **The judgment of the district court is affirmed. Costs to appellees.**

By The Court

Francis P. Scigliano
Clerk.

[cc: Messrs, Orlando & Muzyka]

[NOT FOR PUBLICATION]
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1690

THOMAS TRUPIANO,

Plaintiff, Appellant,

v.

CAPTAIN GUS & BROTHERS, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert B. Collings,
U.S. Magistrate Judge]

Before

Selya, Circuit Judge,

Coffin, Senior Circuit Judge,

and Stahl, Circuit Judge.

Joseph M. Orlando, with whom Orlando & Associates was on brief, for appellant.

Thomas J. Muzyka, with whom Robert E. Collins and Clinton & Muzyka, P.C. were on brief, for appellee.

DECEMBER 15, 1994

Per Curiam. Following an evidentiary hearing in which a magistrate judge awarded plaintiff-appellant Thomas Trupiano, a seaman, maintenance and cure,[1] Trupiano appealed. His appeal presents what amounts to a single factbound issue: whether the court below erred in failing to hold defendant-appellee, Captain Gus & Bros., Inc., liable for punitive damages and attorneys' fees in consequence of it refusal to pay maintenance and cure to Trupiano when and as due.

Plaintiff, of course, had the burden of proving defendant's liability for these imposts by showing that defendant was "callous, willful, or recalcitrant in withholding [maintenance and cure] payments." Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1051 (1st Cir. 1973). Given that burden, given the conflicted nature of the evidence, given the gaps in the available information that existed up to the time

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[1]The evidentiary hearing followed a jury trial on issues involving claims of unseaworthiness and Jones Act liability. Those issues are not before us.

of trial, and given, especially, the deferential standard of review that pertains, see, e.g., DiMillo v. Sheepscot Pilots, Inc., 870 F.2d 746, 749 (1st Cir. 1989) ("In maritime cases, we review factbound findings stemming from a bench trial in accordance with the 'clearly erroneous' principle of Fed. R. Civ. P. 52(a)."), we cannot say that the district court clearly erred in finding that defendant's failure to make timely payments of maintenance and cure, though eventually adjudged to be without adequate legal basis, did not justify the imposition of punitive damages and/or attorneys' fees. After all, when there are two plausible sets of inferences that can be drawn from the facts, the trier's choice between them cannot be clearly erroneous. See Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985); Cumpiano v. Banco Santander P.R., 902 F.2d 148, 152 (1st Cir. 1990). So it is here.

We need go no further. [2] Because it "clearly appear[s] that no substantial question is presented" by this

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[2]To be sure appellant also complains that the lower court improperly denied his motion to amend in order to add the boat-owner's insurer as a party defendant. We think that ruling was well within the magistrate's discretion. In any event, the insurer's status as a party obviously would not have affected the outcome either of the case or of the appeal.

appeal, 1st Cir. R. 27.1, the judgment below can be summarily

Affirmed. Costs to appellee.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

THOMAS TRUPIANO,

V. CIVIL ACTION NO.89-0716-WD

CAPT. GUS & BROTHERS, INC.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW ON ISSUES REMAINING TO BE DECIDED ON COUNT III OF PLAINTIFF'S AMENDED COMPLAINT

COLLINGS, U.S.M.J.

I. INTRODUCTION

On January 31, 1991, plaintiff filed a three-count Amended Complaint, Etc. (#10). Count I sought recovery under the Jones Act for personal injuries occurring on or about September 1, 1987 while the plaintiff was a seaman on defendant's vessel. Count II sought recovery on the basis of the unseaworthiness of the defendant's vessel. Count III sought recovery for maintenance and cure. On November 30, 1992, the parties consented to have the case referred to me for all further proceedings, including jury trial, and on

December 2, 1992, the District Judge referred the case to me for all purposes pursuant to 28 U.S.C. § 636(c). Trial was held on January 19, 25, 26, 27, 28 and 29, 1993. On January 29, 1993, the jury returned a verdict for the plaintiff, finding that the plaintiff was injured in or about September 1987 while employed on the defendant's vessel and that the defendant's negligence and its vessel's unseaworthiness were a proximate cause of the injury. The jury awarded the plaintiff $425,000.00. See # 79.

The parties agree that on the basis of the jury's verdict, the plaintiff is entitled to prevail on Count III. Since all medical expenses were reimbursed in the award on Counts I and II, there is no entitlement to cure. The parties are in agreement on the amount of maintenance to be paid and the time periods for which the plaintiff is entitled to maintenance payments.[1] The parties agreed to have the Court rule on that

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[1]See # 114, p. 2-19. Defendant's Proposed Findings of Facts and Conclusions of Law (#131) filed by successor counsel attempts to argue that no maintenance is due at all. This is clearly contrary to the agreements reached at trial. It was agreed at trial that if the jury found that the plaintiff was injured on the vessel, he would be entitled to maintenance and cure after May 15, 1989. It was further agreed that, as of the time of trial, the plaintiff had not reached an end result. See # 114, p. 2-19. Accordingly, questions # # 9 and 10 asked the jury to determine, if no liability had been found under the Jones Act or general maritime law, whether the plaintiff was injured on the vessel and whether

part of Count III which seeks "...an award of punitive damages, attorney's fees for the defendant's willful and persistent failure to make prompt payment of maintenance and cure during the period of plaintiff's disability." See #10, p. 4.

Additional evidence on this issue was taken on April 20, 1993; both parties have filed proposed findings of fact and conclusions of law,[2] and the matter is ripe for decision. I accept the jury's finding that in or about September, 1987, the plaintiff received injuries to his back on board the defendant's vessel while he was in the employ of the vessel when he slipped on hydraulic fluid and fell on the deck during an operation in which he was helping to bring a catch over the side of the vessel. The issue is whether the defendant was "...callous, willful or recalcitrant in withholding these [i.e.,

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Dr. Huffnagle's operation was medically necessary. If there had been an issue of whether, at the time of trial, the plaintiff had reached an end medical result, that question would have been put to the jury. It was not because of defendant's counsel's concession that an end medical result had not been reached. Accordingly, the plaintiff is entitled to maintenance in the amount of $10.00 per day from May 15, 1989 to January 29, 1993, the date of the jury's verdict. As stated, supra, since the jury awarded compensatory damages for all past medicals, any award for cure would be duplicative; hence, I shall make no award for cure.

[2]See # # 130 and 131.

maintenance and cure] payments." Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1051 (1 Cir., 1973).

II. FINDINGS OF FACT

1. In April, 1987, the plaintiff was hired by Dominic Sanfilippo as a member of the crew of the F/V CAPTAIN GUS. Dominic Sanfilippo was the owner of the vessel.

2. In August, 1987, the plaintiff was a member of the crew of the F/V CAPTAIN GUS when it went out on a trip with Charles Reed as Captain. Dominic Sanfilippo was not on the vessel during that trip.

3. The plaintiff did not work after the August/September trip (on which he was injured) until November, 1987. During the period he did not work, he rested but did not seek medical attention.

4. In November, 1987, the plaintiff went back to work, this time on the F/V JOSEPH & LUCIA II.

5. After January 1, 1988, the plaintiff worked on the F/V JOSEPH & LUCIA III for a number of trips, the last one ending in May, 1988. The plaintiff never returned to fishing after May, 1988.

6. The first medical treatment the plaintiff

received for his back injury was in the emergency room at the Addison-Gilbert Hospital on December 7, 1987. The subsequent day, December 8, 1987, the plaintiff saw Dr. Boswell at the Cape Ann Medical Center. On December 11, 1987, the plaintiff received a CAT scan at the Beverly Hospital. On December 16, 1987, the plaintiff was treated by Dr. Heisey.

7. The first time the defendant corporation was on notice of plaintiff's injury was in October or November of 1987. I base this finding solely on the admission of the defendant in answer to interrogatory # 9. I can make no finding as to the manner of notification or to which representative of the corporation notification was given. I do find that Dominic Sanfilippo was on notice of the plaintiff's injury when he received a letter from plaintiff's attorney dated February 3, 1988. Captain Reed did not inform Dominic Sanfilippo of plaintiff's injury prior to the notification from plaintiff's attorney. I do not find credible plaintiff's testimony that he told Mr. Sanfilippo's father about the injury and requested maintenance and cure when the ship docked at the conclusion of the August/September 1987 trip on which plaintiff was injured.

8. Allan Pollock, a crewman on board the F/V

CAPTAIN GUS who was working with the plaintiff at the time of his injury, never told Dominic Sanfilippo that the plaintiff had been injured on board his vessel.

9. David Lacey, another crewman on board the F/V CAPTAIN GUS at the time the plaintiff was injured, never told Dominic Sanfilippo that the plaintiff had been injured on board his vessel.

10. At all relevant times, the F/V CAPTAIN GUS was insured by the St. Paul Fire and Marine Insurance Company.[3] The insurance company received notice of the claim on February 8, 1988, five days after plaintiff's attorney wrote his letter to Dominic Sanfilippo.

11. Upon verification of coverage, St. Paul assigned Mr. F. Louis Fitzpatrick of Chadwick Services to investigate the claim on St. Paul's behalf. Mr. Fitzpatrick submitted his first report on February 23, 1988 containing medical records from Dr. Heisey, Dr. David Cohen and Dr. Stanley Fons. Under a paragraph entitled CURRENT EVALUATION OF THE MEDICALS, Mr. Fitzpatrick wrote:

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[3]Hereinafter, "St. Paul".

> Based on the information that we have, the claimant did not seek medical treatment for approximately three or four months after an alleged date of loss. One of the doctors indicates that the patient was very vague about how this back problem arose. This was Dr. Heisey, who saw the claimant first. When Doctor Cohen saw the claimant a week later, for some reason, he got much more definite information. We believe that much more medical information and further investigation is necessary before maintenance and cure should be extended to this claimant.

Under the section entitled FUTURE WORK, Mr. Fitzpatrick wrote:

> The insured is very skeptical regarding the validity of this claim. The medical reports we have so far indicate that the claimant did not seek treatment for several months after his injury. It also indicates a brief return to work for 10 days which ended around sometime in November. It may or may not be important to identify the vessel that he was working on then, however, [sic] it could be found if he has another claim against them or that the injury may have occurred or least been aggravated on that vessel.
>
> We have asked Attorney Orlando for more medical information. We will follow up on obtaining statements from crew members and will take photographs of the vessel once a place of injury on the vessel has been determined or at least indicated.

12. In the usual course, Mr. Fitzpatrick received a

letter from plaintiff's counsel dated February 17, 1988 demanding payment of Dr. Heisey's bill ($100.00) and Dr. Cohen's bill ($55.00) "[p]ursuant to your obligation under the maintenance and cure provisions of the maritime law."

13. On February 28, 1988, Michael O'Reilly, a representative of St. Paul reviewed the preliminary report and noted that the "[c]laimant is represented by Joe Orlando, a notorious [plaintiffs'] atty. in New England." Mr. O'Reilly further noted that "[c]laim is suspect; need additional information, i.e. statements by crew."

14. Mr. Fitzpatrick then obtained recorded statements from members of the crew. Mr. Marvin B. Wilson, III, the engineer, told Mr. Fitzpatrick that he did not witness the plaintiff fall, was not told of any fall by the plaintiff during the trip, and that the plaintiff never complained to him about any back injury. He said that plaintiff first told him about it in January, 1988. Mr. Myles David Lacey said that on the August/September, 1987 trip, he saw the plaintiff "fall in the hatch one day", i.e. he fell on the fish hold hatch on deck at a time when he was going to move from one side to another. Mr. Lacey stated that plaintiff stepped on the metal hatch cover and landed on his back, that he complained about his back thereafter, but that

he kept working for the rest of the trip. Mr. Lacey also saw plaintiff slip and fall several times inthe fish hold during the trip.

14.[Sic] Mr. Fitzpatrick prepared a further report and forwarded it to St. Paul on March 2, 1988. The last two paragraphs of the report read:

> Off the record, Mr. Wilson informed me that he did not believe that Mr. Trupiano's claim was valid. He also mentioned having been approached by the claimant who asked him to give a statement to his attorney. Other details regarding this were gone into, and if you wish, we can discuss these by telephone as it is not necessary to go into details in a report.
>
> FUTURE WORK: We will continue our efforts to investigate this claim by obtaining other statements from crew members and taking photographs of the vessel. We will also continue working on finding out the claimant's work activities and what other vessels he may have worked on since the date of loss.

15. On March 1, 1988, Attorney Orlando forwarded copies of Dr. Boswell's and Dr. Hewson's records.

16. Mr. Fitzpatrick prepared a further report and forwarded it to St. Paul on March 15, 1988. On March 17, 1988, Mr. O'Reilly of St. Paul called Mr. Fitzpatrick and

requested several matters which were noted as follows:

> - Asked him [Fitzpatrick] to follow up with [plaintiff's] atty to get better copies of medicals, unable to read copies supplied.
>
> - Follow-up with Dr. Boswell re: his letter of 2/19/88. Reference is made to "unrelated problem and not [sic] mention of progress of his back pain." What is the unrelated problem.
>
> - Continue to attempt to locate crew members. Louis has statement from Capt[ain] that nothing happened or was reported.
>
> - Claimant is working on another boat. Follow up to document that he is presently employed in the industry.

17. Mr. Fitzpatrick prepared a further report and forwarded it to St. Paul on March 22, 1988 containing the results of his interview with Captain Reed. The second paragraph of the report reads as follows:

> Mr. Reed informed me that Thomas Trupiano never reported any injury to him. Mr. Reed also did not witness any accident and did not hear of any accident from any other crew member until several months after the supposed date of loss. At that time, he said that he heard from David Lacey that Mr. Trupiano had a fall several months earlier on the Captain Gus.

The last paragraph of the report reads:

> INFORMATION REGARDING CLAIMANT: Mr. Trupiano is currently employed on the F/V Joseph &

> Lucia III, per Charles Reed. Mr. Trupiano, we are also told, is taking every other trip off. He is apparently going to claim that this is because of his back problem. We will follow up and attempt to get the supplement [sic] sheets regarding Mr. Trupiano's employment on the Joseph & Lucia III.

18. In the usual course, Mr. Fitzpatrick received a letter from plaintiff's counsel dated March 16, 1988 demanding payment of the bill from Elliot Hospital ($735.00) "[p]ursuant to your obligation under the maintenance and cure provisions of the maritime law..."

17.[Sic] Mr. Fitzpatrick prepared a further report and forwarded it to St. Paul on March 29, 1988. The report reads as follows:

> CORRESPONDENCE FROM ORLANDO & ASSOCIATES: This letter is dated March 16, 1988 and encloses a medical bill and a medical report. We are not as yet enclosing the medical bill and we do not in fact at present recommend payment.
>
> MEDICAL REPORT - DR. MICHAEL WERTZ: This is an office note dated December 10, 1987.
>
> Here there is some new information which indicates a different date of loss. Here it is said that the patient "injured his back in June, 1987". Here again there is a different description about the cause of the loss. Michael [sic] Lacey had told me that the claimant fell on the fish hold hatch when he was stepping onto it to

pass a fish. Here it is indicated that "the patient indicates that he was bringing the fish into the boat when he felt a searing sensation in his back". In the first case, I was told that the claimant had a fall and in the second case, it appears to be a muscle tear type of injury.

The patient had left sided sciatica and low back pain at the doctor's office. He was placed on anti-inflammatory medication and was indicated to go to physical therapy. There is also an important note in which the doctor said that the patient made his condition worse by his own actions. It is said that "it was made worse this past weekend when the patient was chopping ice with a pick axe". It is possible that this may have been when he was employed on the F/V Joseph & Lucia III but we are not certain of this.

CLAIM EVALUATION: At present, this claim is in a very nebulous state since we have such conflicting information including the date of loss was either June, August or September of 1987. We also have conflicting information regarding the circumstances of it. I believe that the Sanfilippo family have good cause to be suspicious of this claim.

SETTLEMENT SHEET: I had asked Gloucester Marine Railway for settlement sheets for their Joseph & Lucia III. However, they only sent me one for the Joseph & Lucia II. This does indicate that Mr. Trupiano was employed for one trip on that vessel which was number 18 in 1987. This trip went from December 20 to December 22, 1987. Mr. Trupiano received a grand total of $79.80 for this trip. We will

be following up with Gloucester Marine Railway, asking them for information from the Joseph & Lucia III.

Emphasis in original.

18. Mr. Fitzpatrick prepared a further report and forwarded it to St. Paul on April 11, 1988. The report reads, in pertinent part, as follows:

> SETTLEMENT SHEETS F/V JOSEPH & LUCIA III: Mr. Trupiano has recently been working on this vessel. I obtained these settlement sheets while I was in the area from Gloucester Marine Railway. You will note that in 1988, the claimant worked on this vessel for the trip ending January 19, 1988. This was the first trip of the year. He had apparently took [sic] the following two trips off. He then worked the fourth, fifth, and sixth trips of the year which were settled on March 2, 1988; March 15, 1988; and March 24, 1988, respectively.
>
> CORRESPONDENCE FROM ATTORNEY ORLANDO: Enclosed is a copy of the March 30, 1988 letter of Joseph M. Orlando. For your records I am enclosing a copy of the bill which he sent us from Elliot X-Ray Consultants. This is for treatment on February 3, 1988. At present, we are not recommending payment, but simply enclosing this for your file.

19. Mr. Fitzpatrick prepared a further report and forwarded it to St. Paul on May 4, 1988. The report reads,

in pertinent part, as follows:

> CLAIM EVALUATION: This is a claim where the claimant did not seek medical treatment until at least several months after the date of loss. The date of loss itself is still not yet determined as we have an indication it was in June of 1987, August, or September of 1987. The injury was never reported to the Captain, per his statement, which I have been recently able to obtain and which has already been reported on to you. One crew member, Miles [sic] David Lacey, informed me that the claimant had fallen while on the vessel both up on deck and down in the fish hold. I do not know how much significance to attach to that, however, as people are likely to fall when they are working on a fishing vessel when they are working in any type of moderate to rough weather.
>
> Once we get the medical information from Elliot Hospital and Addison Gilbert Hospital as promised by Attorney Orlando, a final evaluation of this claim can be made. At that time a decision should be made whether to outright deny the claim completely, or whether to attempt some type of adjustment. If you wish to attempt to settle the claim, I would recommend discussing this with the Sanfilippos as they have expressed to me their apparently justifiable belief that this claim is not a valid one. In addition, we believe there is a $2,500 applicable deductible. If this figure is incorrect, please let us know.

20. On May 25, 1988, upon receipt of a letter from Attorney Orlando enclosing a consultation report

regarding the MRI performed February 3, 1988 at the Elliot Hospital, Mr. Fitzpatrick requested Attorney Orlando to procure a CT scan performed January 5, 1988 with which the MRI scan was noted as being consistent. However, the CT scan of January 5, 1988 was not able to be located.

21. On June 8, 1988, Mr. Fitzpatrick forwarded a report in which he enclosed a statement by Mr. Sanfilippo to the effect that he observed no injury to the plaintiff nor was any injury to the plaintiff reported to him.

22. On June 16, 1988, Mr. Fitzpatrick forwarded a report in which he wrote:

> RECOMMENDATIONS: The insureds have expressed great skepticism regarding the validity of this claim. Domonic [sic] Sanfilippo did not have any accident or injury reported to him by the claimant in June of 1987, which is one of the dates on the medical reports that is indicated as being the date of loss. The other captain, Mr. Reed, also did not have any accident or injury reported to him by Mr. Trupiano on his last trip in September of 1987. Mr. Lacey, a crew member on the Captain Gus, did indicate that Mr. Trupiano fell down in a couple of places. He said that one time at least he fell on deck and another time he fell in the fish hold. I would suggest that it is common for fishermen to fall on fishing vessels, and since Mr. Trupiano did not seek medical treatment for 3 more months, that it is very questionable whether he was injured on the Captain

> Gus or else whether he was injured while doing something at home. That he did in fact have some type of back problem seems to be documented by the medical reports. The question is whether it occurred in the service of the vessel, Captain Gus, or not.
>
> Based on the above information, I would not recommend payment of maintenance and cure for this claim. After you have reviewed the file, please get back to me whether or not you differ or agree with this recommendation. I will then present this to Attorney Joseph Orlando.

23. On June 21, 1988, Mr. Fitzpatrick forwarded a report in which he wrote that: "Our investigation is continuing. We are particularly concerned about this claim as we definitely do anticipate that there will be litigation due to the circumstances."

24. On June 21, 1988, Attorney Orlando forwarded a copy of the January 5, 1988 CT scan.

25. On June 30, 1988, Mr. Fitzpatrick forwarded a report in which he enclosed the CT scan report of January 5, 1988 and commented as follows:

> CT SCAN FROM ADDISON GILBERT HOSPITAL: The scan was done on January 5, 1988. X-rays of the lumbar spine showed "mild developmental asymmetry of L-5." The impression was that things were "essentially normal", but they pointed out this

asymmetry.

The Cat Scan of the lumbar spine, which was a computerized tomography, found what they thought was a mild disc herniation of L5-S1. This was said to be essentially central but extended "a little to the right of the midline."

Of interest is that on Page 2, they say "this does not correlate with the patient's symptoms on the left and confirmation by myelography or MR is suggested".

In regard to the sentence above, we note that the office note of December 10, 1987 of Dr. Michael Wertz indicated that the patient was complaining of pain radiating "down the left leg". The problem that the Cat Scan found was on the central area and going to the right.

RECOMMENDATION: Because of the conflicts in the findings of these, I would recommend an impartial medical examination. Alternatively you may wish to advise Attorney Orlando regarding whether you wish to deny the claim entirely since we have a number of questions involved as we have indicated in earlier reports. An IME may be the better route since this would not be a commitment to accept the claim anyway.

25.[Sic] On July 19, 1988, Mr. Fitzpatrick forwarded a report indicating the plaintiff's employment. He noted that the plaintiff worked on the F/V CAPTAIN GUS from April

27, 1987 to September 21, 1987 and on the F/V JOSEPH & LUCIA II from November 12, 1987 to December 22, 1987. He further noted that the plaintiff worked on the F/V JOSEPH & LUCIA III for a trip ending January 19, 1988, took two trips off, and then worked from March 22, 1988 to May 10, 1988. Mr. Fitzpatrick further wrote:

> Please note that the claimant first received medical treatment on December 8, 1987. This is after he had already been working on the Joseph & Lucia II for one trip.
>
> One of the initial medical reports indicated that the claimant said that he injured his back when he was bringing a swordfish aboard a boat in June 1987. It was also said that he had just seen a lawyer. A medical report shortly thereafter then had a different story saying that the claimant slipped on oil. The date was also then reported as either August or September of 1987. One of the medical reports indicated that the claimant was very vague about what had happened to cause his back problem.

27. On August 4, 1988, Mr. O'Reilly wrote the following letter to Susan G. Smith, Ocean Marine Claims Supervisor at St. Paul's Houston Service Center:

> 8/4/88 Susan, I feel that this claim is bogus and want to deny M & C. I will outline the claim and reasons why I think it is bogus.
> Trupiano was employed as a mate on the Capt. Gus.

In Feb '88, our assured received a letter from Atty Orlando of representation. Orlando does not give any specific details of claim but states it occurred in Aug or Sept '87.
Claimant first sought medical attention on Dec 8, 1987, 3-4 months after alleged incident. Treated by a variety of physicians. MRI in Jan '88 reveals minimal midline herniation at L5/S1 level, it extends to the right of midline. Dr. Cohen indicates that this is not consistent with patient's symptoms.

1. In Dec '87 he told Dr. Boswell that he had a 2 month history of back pain. This is not consistent with Aug/Sept injury.
2. Told Dr. on 12/10/87 that he injured his back swordfishing in June '87.
3. Dr. Boswell examined him after 12/8/87 for other problems and no comment was made of back pain.
4. He told Dr. Heisey on 12/21/87 back pain developed in Sept '87, vague on details.
5. Told Drs. in Jan '88 he slipped on oil, Aug/Sept '87.
6. Statements taken from Capt and 2 crewmembers, no injury reported.
7. Claimant worked on fish boats until 5/88 when he was fired.

It appears that patient "may" have a back problem and is looking for someone to pin it on. Let me know what you think.

28. After various notes back and forth, Ms. Smith

concluded on August 8, 1988 that "[i]t doesn't look like we have any evidence to prove that the claimant injured himself on our vessel."

29. St. Paul arranged for the plaintiff to undergo an independent medical examination (IME), although it does not appear why this was done in view of Ms. Smith's conclusion. The plaintiff did not show for the IME on September 6, 1988.

30. The IME was conducted on October 18, 1988; Dr. Lupien concluded:

> Mr. Trupiano complained of some low back pain extending into his right lower extremity subsequent to allegedly having sustained injury sometime during August of 1987. Mr. Trupiano's examination revealed noobjective evidence [sic] any physical impairment or loss of physical function...Mr. Trupiano was considered physically capable of performing the usual work of a commercial fisherman including bending, lifting, climbing, and carrying heavy objects. He was not a candidate for any further clinical investigation or treatment. His prognosis for returning to work appeared to depend entirely upon his own motivation to do so. The medical records available for review do not indicate any any [sic] documented anatomical diagnosis or

objective physical finding.

31. On November 23, 1988, Thomas Frost, Marine Claims Representative for St. Paul, wrote a letter to Dominic Sanfilippo which related, in pertinent part:

> As you are aware, the claimant, by and through his attorney, has made repeated demands for the payment of maintenance. No maintenance to date has been paid.
>
> I spoke with Attorney David Mech of Orlando and Associates, claimant's attorney, on November 22 and was advised that Captain Reed has given a statement to that attorney representing that:
>
> (a) Claimant reported, on or about August of '87, a vessel related injury or accident to Captain Reed, and
>
> (b) That the "Captain Gus's" hydraulic line had burst on the starboard side of that vessel and that deck tiles were loose/missing during late August '87. Mr. Mech agreed to send corroborative documentation as to the above.
>
> At this point, I would strongly suggest an immediate reconsideration as to payments of maintenance to the claimant. As you are aware, punitive damages may be assessed in cases of bad faith non-payment of maintenance and this type of damage is not covered by your policy of insurance.

32. On December 19, 1988, Mr. Fitzpatrick sent a report containing the results of a re-interview of Captain Reed, noting that:

> Mr Reed informs us that he "could not recall" any injury being reported to him. This is basically the same thing that he told me in his previous statement. He did say that Dave Mech of Orlando & Associates had called him and had taken a written statement from him. Although, he said that he gave the same exact information to Orlando & Associates that he gave to me.
>
> There is some new information. Mr. Reed also told me that Alan Pollock who was one of the crew members of the Captain Gus, has recently told him that he and Tom Trupiano reported the injury to Mr. Reed at the time it happened. Mr. Reed, however, said that he does not recall this. There is some problem or danger here; however, because Mr. Reed is not saying that it did not happen but is saying that he does not recall this [sic].

Mr. Fitzpatrick indicated that he was still trying to locate Mr. Pollack to interview him.

33. On January 30, 1989, Mr. Frost spoke with Captain Reed who indicated that hydraulic oil had been leaking on the deck of the F/V CAPTAIN GUS on the trip on which the plaintiff claims to have been injured.

34. On June 15, 1989, Mr. Fitzpatrick sent a report indicating that Mr. Sanfilippo, when contacted, informed him that he would leave the decision as to whether or not to approve the payment of maintenance and cure to Captain

Reed.

35. On July 21, 1989, St. Paul received a copy of the initial Complaint in the above-styled case.

36. On July 21, 1989, Mr. O'Reilly sent a detailed letter, called an "overfile" report to the Home Office.

37. On July 27, 1989, the Home Office replied, in substance, that until a statement from Mr. Pollock was obtained substantiating plaintiff's claim, the case "sounds like one to defend."

38. On September 15, 1989, Mr. O'Reilly requested that Mr. Fitzpatrick, among other things, make another attempt to locate Mr. Pollock.

39. On February 14, 1990, Mr. Fitzpatrick reported that he was still unable to locate Mr. Pollock.

40. On August 22, 1990, the insurer received a copy of the Amended Complaint.

41. On September 11, 1990, Wyndell D. Hunt of St. Paul took over the handling of Mr. Trupiano's claim.

42. On September 12, 1990, the insurer's file was forwarded to Wesley S. Chused, Esquire, of Kroll & Tract who were counsel retained by the insurer to defend plaintiff's suit.

43. On September 25, 1990, Mr. Orlando wrote to Mr. Chused demanding maintenance and cure. The third paragraph of that letter read as follows:

> On or about August 31, 1987 while a member of the crew of the F/V Capt. Gus, Mr. Trupiano sustained injuries to his lower back. Mr. Trupiano slipped and fell on hydraulic fluid while he was working on deck of the F/V Capt. Gus. Although our client cannot say exactly what date the accident took place, he can for certain state that it happened at the end of August 1987. For the sole purpose of obtaining our client's

maintenance and cure payments due to him, we have arbitrarily chosen the last day of August as the date of the accident. Upon discovery on the exact date of the accident, we will pass it on to you.

44. On November 30, 1990, Mr. Hunt wrote the following letter to Dominic Sanfilippo:

> As you know, Mr. Trupiano is represented by attorney Joseph Orlando for his alleged injury aboard the F/V "CAPTAIN GUS" on or about September 1, 1987. At this time, attorney Orlando has demanded we initiate maintenance and cure benefits. To date, these benefits have not been provided. We ask if you wish to provide Mr. Trupiano with maintenance and cure benefits or authorize our office to do so. Please note that in the event that Mr. Trupiano should prevail in a court of law, you may be assessed punitive damages. Punitive damages are a penalty assessed by the court for failure to pay maintenance and cure benefits and are not covered under your St. Paul policy number 342ZT2947.

45. On February 4, 1991, Dominic Sanfilippo, in a telephone call with Mr. Hunt, authorized the payment of maintenance and cure.

46. On February 19, 1991, Mr. Hunt discussed the case with his superior at St. Paul, one Philip Broderick. As a result of that discussion, St. Paul decided not to pay

maintenance and cure because it did not appear that Mr. Trupiano was injured on the insured's vessel. That decision was based on the inconsistencies respecting the date of the injury, the medical documentation, the work history after the alleged injury, and the statements of the crew members.

III. CONCLUSIONS OF LAW

Since the Supreme Court's decision in Vaughan v. Atkinson, 369 U.S. 527 (1962), it is well-settled that a seaman can recover punitive damages and/or attorney's fees for a refusal to pay maintenance and cure in a case in which a shipowner was "callous, willful or recalcitrant in withholding these payments." Robinson v. Pocahontas, Inc., 477 F.2d 1048, 1051 (1 [sic]Cir. 1973). In the Robinson case, the First Circuit quoted with approval from Justice Stewart's separate opinion in the Vaughan[4] case as follows:

> '[I]f the shipowner's refusal to pay maintenance stemmed from a wanton and intentional disregard of the legal rights of the seaman, the latter would be entitled to exemplary damages in accord with traditional concepts of the law of damages. McCormick, Damages, § 79. While the amount so

[4]369 U.S. at 6540, 82 S.Ct. at 1004

> awarded would be in the discretion of the fact finder, and would not necessarily be measured by the amount of counsel fees, indirect compensation for such expenditures might thus be made.'

Robinson v. Pocahontas, Inc., supra, 477 F.2d 1048 at 1051.

Thus, in order to prevail on his claim for punitive damages and attorney's fees, the plaintiff has the burden of proving by a preponderance of the evidence that the decision to deny maintenance and cure was "callous" in that it stemmed from a "wanton and intentional disregard" of plaintiff's rights or that the defendant willfully and with no good reason either denied payments or was recalcitrant in making the payments.

It is my opinion that the plaintiff has failed to meet his burden of proof. Plaintiff seems to assume that there is liability for punitive damages and attorney's fees whenever a request for maintenance and cure has been made and denied and the plaintiff later succeeds at trial. This is not correct. A shipowner can be found to have denied maintenance and cure without automatically being found to have been "callous" or without having been found to have disregarded a seaman's rights in a "wanton" and "intentional" manner.

The instant case is a good example. First, unlike the

shipowner in the Vaughan case,[5] the insurer herein conducted as thorough an investigation as was possible. All medical records were collected and all crew members who were found were interviewed. Second, the effort to investigate the claim thoroughly was ongoing over an extended period; there was no recalcitrance. Third, the denial was based on information which, in fact, raised serious doubts whether any injury to the plaintiff occurred in August or September, 1987 and if so, whether the injury occurred on defendant's vessel. It does not follow from the fact that the jury, after hearing the evidence at trial, ultimately resolved the issue in plaintiff's favor that the insurer acted wrongfully in coming to the opposite conclusion.

The information upon which the insurer relied in denying the claim was substantial. It consisted of the fact that the injury was not reported to the shipowner for a month or two at the earliest and that the plaintiff worked in November, 1987 and from January to May of 1988 on board other vessels. It was also based on the fact that the plaintiff received no medical treatment for his injury until three

---

[5]The shipowners "...were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it." Vaughan v. Atkinson, supra, 369 U.S. at 530-1.

months after he last worked on the F/V CAPTAIN GUS. In addition, the investigation conducted by the insurer revealed that none of the crew members who were able to be interviewed could substantiate the claim of an injury in the manner in which the plaintiff claimed. The one crew member who did state that the plaintiff fell on the vessel was Mr. Lacey who said the plaintiff fell on the fish hold hatch one day when he was going to move from one side of the vessel to the other and several times in the hatch. Plaintiff's claim was that he fell on hydraulic fluid on deck while bringing in a catch from over the side of the vessel. There was evidence in the medical records received by the insurer that the plaintiff injured his back in June, 1987 and that the injury was worsened when the plaintiff was chopping ice with a pick axe in early December, 1987. Lastly, an independent medical examination conducted at the request of the insurer did not substantiate the claim of injury.

This is not to say that there was no evidence supporting the plaintiff's claim. But it is my opinion, based on the foregoing, that the plaintiff has failed to prove by a preponderance of the evidence that the decision to deny maintenance and cure was "callous" in that it stemmed from a "wanton and intentional disregard" of the plaintiff's rights

or that the defendant willfully and with no good reason either denied payments or was recalcitrant in making the payments. The preponderance of the evidence is otherwise.

IV. CONCLUSION

Accordingly, I shall not make an award for either punitive damages or attorney's fees. Judgment shall enter on Count III for the plaintiff awarding him maintenance from May 15, 1989 to January 29, 1993; judgment shall enter for the defendant on that portion of Count III which asserts a claim for punitive damages and attorney's fees.

"s/_____"
ROBERT B. COLLINGS
United States
Magistrate Judge

April 14, 1994.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

THOMAS TRUPIANO,
Plaintiff

v.

CIVIL ACTION
NO. 89-0716-DPW
(COLLINGS, M.J.)

CAPT. GUS & BROTHERS, INC.,
Defendant

JUDGMENT

This action came on for trial by jury before the Court, Robert B. Collings, United States Magistrate Judge, presiding. The issues having been duly tried and the jury having rendered its verdict, and the Court having issued findings of fact and rulings of law on the questions reserved to it, **it is ordered and adjudged:**

Judgment for the plaintiff on Counts I and II of the Amended Complaint (#10) in the amount of $425,000.00 plus interest on $77,000.00 from May 15, 1989 to April 14, 1994 at the rate of 3.5% in the amount of $13,325.48, for a total of $438,325.48 (Four hundred thirty-eight thousand three hundred twenty-five and 48/100 dollars).

Judgment for the plaintiff on Count III of the Amended Complaint (#10) seeking the payment of

maintenance and cure in the amount of $10.00 per day from May 15, 1989 to and including January 29, 1993 for a total of $13,560.00 (Thirteen thousand five hundred sixty and 00/100 dollars). Judgment for the defendant on the claim for punitive damages and attorney's fees.

The plaintiff may recover his costs on all claims except the claim in Count III for punitive damages and attorney's fees; the defendant may recover its costs in connection with the claim in Count III for punitive damages and attorney's fees.

ROBERT J. SMITH, JR.
CLERK

"s/_____"
Nancy Lee Irwin
Deputy Clerk

Dated at Boston, Massachusetts
April 14, 1994.

(Seal of)
United States District Court
District of Massachusetts

28 U.S.C. §1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

(As amended May 24, 1949, c. 139, § 79, 63 Stat. 101.)

McCormack, The Law of Damages, §79

§79. To subject a wrongdoer to liability for exemplary damages, it must be found that he acted with actual malice, ill will, or conscious disregard of consequences to others. Almost universally the decisions hold that mere "implied malice," which is attributed to any actionable conduct, does not suffice, nor does mere negligence.

Supreme Court, U.S.
FILED
APR 10 1995
OFFICE OF THE CLERK

No. 94-1512

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THOMAS TRUPIANO,

Petitioner,

v.

CAPTAIN GUS & BROTHERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Appeals Court erred in Summarily Affirming the District Court's decision that Petitioner had not proven that the Respondent was callous, willful or recalcitrant in failing to pay maintenance benefits?

LIST OF PARTIES

Petitioner, Thomas Trupiano, is an individual resident of the Commonwealth of Massachusetts.

Respondent, Captain Gus & Brothers, Inc., is a Massachusetts corporation which, at all times pertinent herein, was the owner of the F/V CAPT. GUS.

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THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Captain Gus & Brothers, Inc., respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Thomas Trupiano.

OPINIONS BELOW

The suit was brought in the United States District Court for the District of Massachusetts under the Jones Act, 46 U.S.C. §688 et seq, and the admiralty jurisdiction, 26 U.S.C. §1333. By agreement of counsel, the negligence claim under the Jones Act and the unseaworthiness claim under General Maritime Law were tried to a jury and the claim for maintenance and cure benefits was reserved for a decision by the District Court. Also, by agreement of counsel, the matter was referred to United States Magistrate Judge Robert Collings for all purposes.

Based upon a stipulation of counsel entered at the jury trial that the Petitioner had not reached a medical end result, United States Magistrate Judge Collings found, after an evidentiary hearing, that Petitioner was entitled to maintenance benefits in the amount of $13,560.00. However, United States Magistrate Judge Collings found that the Petitioner had not proven that Respondent Captain Gus & Brothers, Inc. acted callous, willful, or recalcitrant in failing to pay maintenance benefits and, therefore, denied punitive damages and attorney's fees.

Petitioner appealed the punitive damages issue to the United States Court of Appeals for the First Circuit. The First Circuit summarily affirmed the judgment. *Trupiano v. Capt. Gus & Brothers, Inc.*, 42 F.3d 1384 (1st Cir. 1994). The First Circuit opinion, the Findings of Fact and Conclusions of Law of United States Magistrate Judge Collings, and the Judgment are reproduced in the Petition for Writ of Certiorari.

STATUTE INVOLVED

The issue of punitive damages for failure to pay maintenance and cure benefits is governed by General Maritime Law. It is not statutory.

STATEMENT OF THE CASE

Mr. Trupiano alleges that he was a member of the crew of the F/V CAPT. GUS when he injured his back. Petitioner did not initially make any claim or report any injury. The vessel owner's first knowledge that Mr. Trupiano was claiming an injury was four months after the alleged accident. Initial indication of a claim of injury by Mr. Trupiano was provided on February 3, 1988 when medical records were forwarded by Petitioner's counsel. The letter was addressed to Enza Rosa Corporation, a corporation which was not the owner or operator of the F/V CAPT. GUS. The reports were for treatment on December 21, 1987 and January 4, 1988 by Dr. Heisey and Dr. Cohen respectively. The report of Dr. Heisey is very vague as to the date of onset. Dr. Patel's note of December 11, 1987 indicates "that approximately three days ago, while in a boat on a fishing trip, he allegedly fell and injured the back." Further, the Beverly Hospital Emergency Room notes of December 7, 1987 indicate "No known trauma. . . ."

The matter was assigned by the vessel owner's underwriter, St. Paul Fire and Marine Insurance Company (hereafter referred to as "St. Paul") to Louis Fitzpatrick of Chadwick Services, Ltd. for investigation. Statements were obtained from crewmembers Marvin B. Wilson and Myles David Lacey. Mr. Wilson indicated that he did not witness any slip and fall accident by Petitioner. Mr. Lacey indicated that he did observe the Petitioner slip

and fall on the top of the fishhold hatch. This version is not consistent with a "slip and fall on oil on the deck." A recorded statement was also taken from Captain Robert Reed on March 16, 1988. Captain Reed indicated that he did not observe the Petitioner slip and fall on the vessel.

On March 16, 1988, Petitioner's counsel provided a copy of a medical report of Dr. Michael Wertz. That medical report indicates that Petitioner injured his back in June, 1987 while bringing a fish aboard the vessel. This now presented the vessel owner with three factual scenarios in which the Petitioner alleges he was injured. After receipt of the medical report of Dr. Wertz, the vessel owner's son, Dominic Sanfilippo, was interviewed and he vehemently denied that the Petitioner sustained any injury in June, 1987. Mr. Dominic Sanfilippo was the Captain for the June, 1987 trips.

A review of the settlement sheets for the F/V CAPT. GUS indicates that the Petitioner was employed aboard the F/V CAPT. GUS on trips number 8, 9, 10, 11, 12, 12b and 13. Those trips comprise the period from April 27, 1987 through September 21, 1987. There was also an indication in the file that the Petitioner worked in mid-November, 1987 aboard the F/V JOSEPH & LUCIA II.

By correspondence of May 26, 1988, Petitioner's counsel requested maintenance benefits at the level of $1,300.00 comprising twenty weeks of disability less the ten days the Petitioner fished aboard the F/V JOSEPH & LUCIA II.

Further compounding the situation is the fact that the Petitioner was examined by several doctors. An MRI in January, 1988 revealed "minimal mid-line herniation

at L5-S1." It further indicates that the herniation extends to the right of mid line. Dr. Cohen indicates that this is not consistent with the patient's symptoms, which were alleged to be sciata radiating to the left side. The December, 1987 report of Dr. Boswell indicates a two month history of back pain, which is inconsistent with an August/September injury.

On August 9, 1988, Michael O'Reilly, the individual at St. Paul adjusting the claim, informed Mr. Fitzpatrick that the underwriter would not pay maintenance and cure on the vessel owner's behalf at this time because it did not appear that any accident/injury occurred aboard the vessel. Mr. Sanfillippo also rejected maintenance payments based upon his understanding of the claim. An IME of the Petitioner on the vessel owner's behalf was performed by Dr. Gordon F. Lupien on October 18, 1988. Dr. Lupien was of the opinion that the Petitioner did not exhibit any objective evidence of disability and, in fact, was attempting to mislead Dr. Lupien as to the nature and extent of his disability.

On November 23, 1988, Michael O'Reailly sent a letter to the vessel owner's representative, Dominic Sanfilippo, indicating that Attorney Mech of Petitioner's counsel's office had advised him that Captain Reed had given a statement that Mr. Trupiano had reported an injury on or about August, 1987 and that the vessel's hydraulic line had burst, making the deck slippery. Based upon that alleged statement, Mr. O'Reilly recommended that the vessel owner reconsider its position concerning payment of maintenance and cure. Mr. O'Reilly additionally indicated that the vessel owner may be subject to punitive damages for failure to pay maintenance and cure benefits and that such an assessment

is not covered under the Protection and Indemnity policy.

On December 6, 1988, Thomas Frost of St. Paul sent a letter to Petitioner's counsel requesting additional information that Mr. Trupiano was injured aboard the F/V CAPT. GUS. Counsel had previously indicated that he would forward a copy of the statement of Captain Reed. However, apparently Petitioner's counsel did not have such a statement and merely forwarded a letter which indicated that Captain Reed *had told him* that an injury had been reported. The transcribed statement of Captain Reed taken previously by Mr. Fitzpatrick is inconsistent with the alleged statement of Captain Reed to Petitioner's counsel.

Upon receipt of such information, Mr. Fitzpatrick again interviewed Captain Reed. He again indicated that he could not recall any injury being reported to him. However, Captain Reed did indicate that a fellow crewmember, Alan Pollock, had indicated that Petitioner reported the injury to Captain Reed at the time it happened.

Mr. Sanfillippo continued to maintain that the Petitioner was not injured while a member of the crew of the F/V CAPT. GUS. Mr. Thomas Frost of St. Paul sent a letter to Mr. Sanfillippo on December 22, 1988, again requesting a reconsideration of payment of maintenance and cure and that any assessment of punitive damages would not be covered under the policy.

In March, 1989, Michael O'Reilly resumed adjusting the claim on behalf of St. Paul Fire and Marine Insurance Company. On March 16, 1989, he conferred with Petitioner's counsel concerning maintenance and cure benefits. The recorded notes from that conversation indicate

that Petitioner's counsel was advised that the vessel owner did not want to pay any maintenance and cure benefits because it did not believe the injury occurred aboard the F/V CAPT. GUS.

On March 22, 1989, Petitioner filed suit. The initial suit was against Enza Rosa Corporation, an improperly named party. On January 30, 1990, Petitioner's counsel filed a Motion to Amend the Complaint to correct the name of the defendant to Capt. Gus & Brothers, Inc. The motion was allowed by District Judge Woodlock on July 24, 1990.

On September 11, 1990, Wyndell Hunt took over the investigation and adjusting of this claim for St. Paul. On November 30, 1990, a certified letter was sent by Wyndell Hunt to Mr. Sanfillippo, requesting instructions as to the payment of maintenance and cure benefits. On February 4, 1991, Mr. Hunt conferred with Domenic Sanfilippo, and payment of maintenance and cure was authorized if St. Paul Fire and Marine Insurance Company believed it was necessary or proper. On February 19, 1991, Mr. Hunt conferred with his superior, Philip Broderick of St. Paul, and a decision was made not to pay maintenance and cure benefits because it did not appear that Mr. Trupiano was injured on the vessel. This decision was upon the following bases:

1) Conflicting reports of injury;

2) The statement of Captain Reed that he did not recall being informed of any injury;

3) The failure of counsel to provide the indicated statement of Captain Reed;

4) The statements of the crewmembers indicating an alleged slip and fall incident inconsistent with the version of the alleged injury by the Petitioner;

5) The fact that the Petitioner waited three to four months before seeking medical attention;

6) The IME report indicating that the Petitioner did not exhibit any signs of injury; and

7) The opinion by Dr. Lupien that the Petitioner was attempting to improperly influence his opinion.

A second physical examination of Petitioner was performed on February 26, 1992 by Dr. Lupien. Dr. Lupien again rendered an opinion that the Petitioner did not indicate any evidence of anatomical derangement or structural lesion sustained during 1987 and that the Petitioner does not show any indication of any residual, physical impairment or loss of physical function which can be attributed to any incident during 1987.

SUMMARY OF ARGUMENT

Respondent Captain Gus & Brothers, Inc., respectfully urges that the Petition for Writ of Certiorari be denied. This case presents no issue appropriate for this Honorable Court's exercise of its discretionary function. Although Petitioner alleges a conflict between the decision herein and precedents in the First and Fifth Circuit Courts of Appeal and the United States Supreme Court, there is no such conflict.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS AND DISTRICT COURT DECISION AND ANY UNITED STATES SUPREME COURT DECISION.

Petitioner maintains that there is a conflict between the decision of the Court of Appeals and the District Court and United States Supreme Court precedent. Petitioner never identifies the conflict or in what way the decision herein failed to comply with the constrictures of this Honorable Court.

Respondent initially notes that the Petitioner has grossly misstated the facts as found by United States Magistrate Judge Collings. In his Petition for Writ of Certiorari, Petitioner states "The plaintiff presented overwhelming medical and factual evidence to the defendant. This evidence clearly proved that the plaintiff had been injured in the service of this vessel." In fact, the complete opposite was found by United States Magistrate Judge Collings. The Findings of Fact and Conclusions of Law of United States Magistrate Judge Collings painstakingly and meticulously examined the evidence presented at the Trial and the further evidentiary hearing, noting the numerous factual discrepancies and the thoroughness of the vessel owner's investigation. United States Magistrate Judge Collings made a Conclusion of Law that:

> . . . First, unlike the shipowner in the *Vaughan* case, the mover herein conducted as thorough an investigation as was possible. All medical records were collected and all crew members who were found were interviewed. Second, the effort to investigate the claim thoroughly was ongoing over an extended period; there was no recalcitrance.

> Third, the denial was based on information which, in fact, raised serious doubts whether any injury to the plaintiff occurred in August or September, 1987 and, if so, whether the injury occurred on defendant's vessel.

Petition Brief at p. A-31-32.

These findings were not disturbed by the First Circuit, which noted that "Given that burden, given the conflicting nature of the evidence, given the gaps in the available information that existed up to the time of trial, and given, especially, the deferential standard of review that pertains, . . . we cannot say that the District Court clearly erred . . ." Petitioner Brief at p. A-3-4. Respondent notes further factual misstatements at page 4-5 of Petitioner's brief where it is stated that "during a telephone conversation, it was agreed that maintenance would be paid upon receipt of information concerning the statement of Charles Reed." There is no support in the record for that allegation. Lastly, it must be noted that the Petitioner's recitation of the facts completely ignores the crucial evidence in the determination of this claim: The investigation by the vessel owner, the findings, the continuing attempts to verify the claim, and the careful attention paid to the matter at all times. These are the factors looked to in deciding whether the Petitioner was callous, willful or recalcitrant.

Petitioner only cites to two United States Supreme Court decisions, neither of which are in conflict with the decision herein. In *Vaughan v. Atkinson,* 369 U.S. 527, 1962), the plaintiff in that case served for four months aboard a vessel owned by American Waterways Corp. He was discharged on termination of the voyage. Five days later, he reported to the United States Public Health Service Hospital for examination and was treated

for suspected tuberculosis. The only investigation conducted by the vessel owner was to obtain a statement from the master and chief engineer. Both officers indicated that Mr. Vaughan never complained of any illness during his four month service. The United States Supreme Court, per Mr. Justice Douglas, stated:

> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

In *Vaughan v. Atkinson,* 369 U.S. 527 (1962), the United States Supreme Court noted that the failure to pay maintenance and cure may give rise to compensatory damages for injuries to the seaman which result from that failure. *Id.* at 533-34. Additionally, such recovery "may also include necessary expenses." *Id.* at 530 (quoting *Cortes v. Baltimore Insular Line,* 287 U.S. 367, 371 (1932). The United States Supreme Court then stated that since the defendant was recalcitrant in refusing to pay maintenance and cure, the plaintiff therein was "forced to hire a lawyer and go to court to get what was plainly owed him." *Id.* at 531. The *Vaughan* Court concluded: "It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." *Id.* The District Court and First Circuit both referred to *Vaughan* and correctly applied its constrictures.

The other case referred to by the Petitioner is *Warren v. United States,* 340 U.S. 523 (1951). That case is

totally inappropriate to the issues herein. The *Warren* case did not have any discussion of punitive damages for callous, willful or recalcitrant failure to pay maintenance and cure benefits. The issue in *Warren* concerned entitlement to maintenance and cure benefits in the first instance. Mr. Warren was injured on shore leave, allegedly because of his own drunkenness. Prior case law had suggested that drunkenness constituted willful misbehavior, negating the entitlement to maintenance and cure benefits. Punitive damages for failure to pay maintenance and cure benefits was not discussed and was not an issue in the litigation.

Thus, Petitioner has not pointed to any conflict with any Supreme Court decision sufficient to mandate this Honorable Court granting the Writ of Certiorari. See Rule 10.1(c) of the Rules of the Supreme Court.

II.

THE FIRST CIRCUIT COURT OF APPEALS CORRECTLY APPLIED *ROBINSON v. POCAHONTAS, INC.*

Petitioner alleges that the decision herein is not consistent with the First Circuit's opinion in *Robinson v. Pocahontas, Inc.*, 447 F.2d 1058 (1st Cir. 1973). Respondent initially notes that a conflict between opinions of the same circuit is not a valid reason for granting a Writ of Certiorari. Such a conflict is more properly addressed by a motion for hearing *en banc*, which was not sought. The only possible basis for supporting the granting of the Writ of Certiorari herein is under Rule 10.1(a) on the basis the First Circuit "has so far departed from the accepted and usual course of judicial proceedings." There is no such factor alleged in the Petition for Writ of Certiorari.

Robinson held that in order to justify punitive damages, the vessel owner's action must be callous, willful or recalcitrant.

The court in *Robinson* based its affirmance of the punitive damages award on the fact that the vessel owner therein initially used a pretext to withhold maintenance and cure payments, refused to pay when notified of the impending mortgage foreclosure, and terminated all maintenance payments after the refusal of the settlement offer. *Robinson,* 477 F.2d at 1052. None of the factors are present in the case at bar. The District Court carefully detailed all the steps taken by the vessel owner and its underwriter to ascertain entitlement of the Petitioner to the maintenance and cure benefits. The District Court noted that:

> . . . All medical records were collected and all crewmembers who were found were interviewed. Second, the effort to investigate the claim thoroughly was ongoing over an extended period; there was no recalcitrance. Third, the denial was based on information which, in fact, raised serious doubts whether any injury to the plaintiff occurred in August or September, 1987 and if so, whether the injury occurred on defendant's vessel.

The District Court went on to note "the information upon which the insurer relied in denying the claim was substantial."

Both the District Court and the First Circuit correctly cited the standard set by *Robinson* and applied the facts herein to that standard. Petitioner's argument, therefore, is that he does not agree with the Findings of Fact and Conclusion of Law as applied. This is not a sufficient basis for granting a Writ of Certiorari.

III.

THERE IS NO CONFLICT BETWEEN THE COURT OF APPEAL'S DECISION AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DECISION IN *HOLMES v. J. RAY McDERMOTT & CO., INC.*

Lastly, Petitioner maintans that the decision herein by the District Court and the First Circuit conflicts with the decision of the Fifth Circuit in *Holmes v. J. Ray McDermott & Co., Inc.*, 734 F.2d 1110 (5th Cir. 1984).

In *Holmes,* there was no question that Mr. Holmes was injured aboard the barge. The issue in *Holmes* was whether maintenance and cure benefits should have been reinstated after receipt of substantiating medical records. *Id.* at 1119. In the case at bar, the initial decision not to pay maintenance and cure was due to a lack of evidence that the Petitioner was injured aboard the F/V CAPT. GUS. Further investigation did not support an injury aboard the F/V CAPT. GUS. The District Court made a finding of fact that the insurer:

> decided not to pay maintenance and cure because it did not appear that Mr. Trupinao [sic] was injured on the insured's vessel. That decision was based on the inconsistencies respecting the date of the injury, the medical documentation, the work history after the alleged injury, and the statements of the crewmembers.

Regardless of what Petitioner's medical condition was, if he was not injured in the service of the F/V CAPT. GUS, he would not be entitled to maintenance and cure benefits. The evidence is clear that the denial of maintenance and cure benefits was based on the lack of factual support that the Petitioner was injured aboard the vessel. Thus, the decision herein does not conflict with the Fifth Circuit decision in *Holmes,* and is, in fact, entirely consistent.

CONCLUSION

For all of the foregoing reasons, Respondent Captain Gus & Brothers, Inc. respectfully urges this Honorable Court that the Petition for a Writ of Certiorari be denied.

By its attorneys,

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